IN THE

Supreme Court of the United States.

October Term, 1923.

No. 59

In the Matter of MARCUSE & COMPANY,
Alleged Bankrupts.

C. B. GILES, et al.,
Petitioners,
vs.
HENRY VETTE, et al.,
Respondents.

REPLY BRIEF FOR PETITIONERS.

William Burry,
Julius Moses,
Guy M. Peters,
Lewis F. Jacobson,
Attorneys for Petitioners.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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Throughout the briefs of respondents runs a confession that no limited partnership was formed under the earlier limited partnership act. It is equally clear and conceded that no limited partnership for a brokerage business could be formed under the new limited partnership act. Respondents therefore practically concede that they were in the wrong and that no limited partnership was ever formed.

Counsel for Vette and others state in their brief (p. 28):

> "It was claimed by petitioning creditors, and conceded by all, that the limited partnership contract never became effective as such within the terms or within the life of the 1874 act."

On page 43 they say:

> "In fact the Act of 1874 may be and properly should be put out of consideration in this case. * * * therefore, the legality of the limited partnership known as Marcuse & Co. must be tested by the provisions of the Act of 1917."

Counsel for Hecht and Finn do not agree with the position so taken but seek to extend the act of 1874 indefinitely beyond its repeal for the purpose of allowing the limited partnership to be completely formed under that act.

The attempt was to form a limited partnership under the 1874 act. The certificate so recited and gave only the information required by that act. It was filed in the office of the county clerk as required by that act, not recorded in the office of the county recorder as required by the act of 1917.

Counsel for all the respondents, however, ultimately fall back, as their main defense, upon Section 11 of the limited partnership act of 1917.

Section 11.

The position of counsel is that Section 11 of the limited partnership act, although expressly excluding brokerage firms from its terms, can be made to apply to an incomplete attempt to form a limited partnership under the repealed act of 1874. Section 11 of the act of 1917 is not applicable to a partnership formed under the act of 1874 unless the act of 1917 can be considered as an amendment of the prior act and interwoven with it. The Court of Appeals held that it was such an amendment, and that is the basis on which the opinion of that court rests. In its opinion it is stated:

> "In this respect we do not conceive Section 11 to be different in its effect as part of the new law than if it had been adopted as an amendment to the old."

It was to this position requiring the interweaving of the statutes and the construction of the Uniform Limited Act as but an amendment to the prior acts, that we directed our attention in our main brief. Counsel for Hecht and Finn still cling, in part, to this position. Prof. Lewis insists that the two acts must not be combined or construed together and that the new act inaugurates a new doctrine of partnership.

Counsel for Vette and others have abandoned the Circuit Court of Appeals' position that the new act must be construed as an amendment to the old, and counsel for Hecht and Finn do not press it. Their position now is that the legislature intended, by Section 11, to relieve from liability even parties who, subsequent to July 1, 1917, attempted to form a limited partnership for purposes not then permitted in Illinois and that therefore Section 11 can be applied to the present case. It is to this attempted application of Section 11 we will direct our attention in reply.

The creditors in this case do not base their claim wholly upon the partnership agreement of June 30th or upon the Hecht-Finn agreement or upon the partnership agreement of April 2nd. None of these agreements were carried to completion. The certificate executed in connection with the partnership agreement of June 30th recites that the agreement is entered into under the law of 1874 and that the parties intend to be partners under that act. They, however, did not file the certificate until after the 1874 act was repealed. The filing of it was, therefore, of no effect, in fact, a nullity. The 1917 act required the certificate to be recorded in the office of the county recorder of deeds and it was never recorded in that office. There was never any lawful recording of that certificate. Therefore, there was never any limited partnership established. Everything effectively done

for the launching of this partnership was done on June 30th. The partnership was therefore fully launched as a general partnership on June 30th before the uniform acts took effect. A partnership was therefore formed under the common law. Its creation was fully completed on June 30th. Nothing was effectively done thereafter. Nothing thereafter changed its *status*. It constituted a fully organized partnership, before the uniform acts took effect. The act of 1917 has nothing whatever to do with it. If the Limited Partnership Act of 1917 has any application it only confirms our position that this organization was a general partnership.

It Was the Intention of the Legislature That After July 1, 1917, a Brokerage Partnership Could Be Carried On Only As a General Partnership.

The Illinois statute provides that a *corporation* may be formed for any purposes except banking, insurance, brokerage and one or two other exceptions.*

The new Illinois Uniform Limited Partnership Act provides that a limited partnership may conduct any business except banking, insurance, *brokerage* and one other exception.

It was, therefore, the intention of the Illinois legislature that after July 1, 1917, when two or more parties joined to carry on a banking, insurance or brokerage business they could do so only as general partners and with unlimited personal liability to their customers for the debts of the business.

When the legislature provided that a brokerage business could not be incorporated or carried on by a limited partnership, it was conferring *rights* as well as imposing *liabilities*. It gave the right to the customer of a

*Cahill's Ill. Rev. Stat. 1921, Chap. 32, Sec. 2.

brokerage house to resort to all the property of any member of the firm to recover moneys or property due him. In fact, in framing laws for banks and brokerage houses the legislature probably thought much more of protecting the depositors or customers of such houses than imposing liabilities on the members of the firm. Protection is the principal thing. When the legislature thus gave this protection to customers of a brokerage house by providing for unlimited liability of the members thereof, it could not have intended to provide, at the same time, that ignorance of the owners of their liabilities should deprive the customers of this protection.

As a court should give full weight to the intention of the legislature to give certain rights of exemption to limited partners in a business other than banking or brokerage, so it should also give full weight to the declared intention of Illinois, that those engaged in banking or brokerage should only do so by incurring unlimited personal liability.

It is this legislative intention to exact unlimited liability from those engaged in the banking or brokerage business that is entirely overlooked by counsel for respondents. There is nothing in the views of Prof. Lewis, in the articles set forth in the appendix to the brief filed for Vette and others at variance from the principle we are advancing, that where a state, by legislative action, has declared positively that no banking or brokerage business shall be carried on without unlimited personal liability, the uniform acts must not be construed in opposition to that declared public policy. And when we remember that Illinois does not permit a brokerage business to be carried on by a *corporation*, there is further confirmation that the public policy of that state is as we have indicated.

When the legislature provided: "A limited partnership may carry on any business except banking, insurance and brokerage," it was saying in other words: "This act shall not apply to a partnership carrying on the business of banking, insurance or brokerage."

If Section 11 can be applied as contended for by respondents' counsel, then those states such as Illinois, which have a consistent policy of requiring unlimited personal liability in brokerage and banking houses, will, of course, find it necessary to amend the Uniform Limited Partnership Act to prevent that act being used to defeat their public policy.

We submit that no such changes should be necessary, as neither Section 11 nor any provision in the Uniform Limited Act was intended to upset a declared public policy or to have any application to a business expressly excluded from the scope of that act.

Respondents Claim That No Customer Dealt With the Firm Relying on Respondents' Financial Credit.

Much stress is laid by respondents on the idea, many times reiterated, that no creditor dealt with the firm of Marcuse & Company believing that the respondents, or any of them, were liable for the debts of the firm.

This answer is not good in law. Probably not one person in a hundred who makes a deposit in a national bank knows that in addition to the resources of the bank he is entitled to the protection of a double liability of the stockholders. Yet the court would pay little attention to a defense made by such stockholders of a failing bank that the liability so placed on them by law should not be enforced because the depositors did not know about it when making their deposits, or should only be enforced in favor of such parties as did know. There

are many cases in the books where a person dealt with one whom he considered a principal and to whose liability only he looked when making the contract. Yet if it afterwards appeared that that person, whom he imagined to be a principal, was only an agent and that there was an undisclosed principal (on whose financial responsibility no reliance had been placed) he has a right to hold the undisclosed principal as a responsible party in the transaction. In the City of Chicago, one of the largest merchandising firms was Marshall Field & Company. There were seven or eight other partners. Few of that firm's many thousand customers knew who the partners were. Probably not one of its customers or of the persons who sold goods to it knew or could have named all the partners. Yet while that concern continued a partnership, every one of those partners was liable to the smallest customer upon any sale or purchase made by that firm.

When the legislature withheld the benefits of the Corporation Act and the Limited Partnership Act from members of a brokerage or banking firm, it intended to give this very protection to their customers. It was intended that every customer should be protected by the responsibility of the unknown and undisclosed partners. It was not intended to limit his resort to those whose connection was known and disclosed, who were held out as partners and on whose known connection he extended credit. Such are liabile both at common law and under the General Partnership Act on the basis of holding out. But the legislature intended, by removing all statutory limitation on liability, to enable the creditor to resort to any of the owners of a brokerage concern, *known or unknown*. The law on partnership and the law on undisclosed principal gives the creditor that right.

When the statutory limitation of liability was withheld from brokerage business the legislature intended to preserve that right.

Moreover there is not the slightest justification in the record for this reiterated statement. There are many hundred creditors of Marcuse & Co. Who can say on what they relied in doing business with that concern? We known in picking a bank or a broker the prospective customer is influenced largely, if not principally, by the responsibility of the men associated therewith. Marcuse had been a member of a brokerage house which had become bankrupt. Morris had been an employee of that firm and was apparently a man of small means and probably no financial standing. They would not attract custom. Hecht and Finn, whose names appeared in the business, were retired from business, and from their counsel's statement were apparently men of substantial means and good financial standing in the community. Hecht spent a large part of his time in the place of business of Marcuse & Company. He was in and out of the private office and spent much time talking with customers. (Rec., 352-3.)

If at any time during the three years this business was operating, a careful, painstaking man, seeking a responsible brokerage house with which to do business—possibly having his account solicited by Marcuse & Co.—possibly having Hecht's and Finn's connection urged on him, started before placing his account to investigate the character of this partnership, what would he have done? He would have examined the records in the county clerk's office up to June 30, 1917, and found no certificate of limited partnership of Marcuse & Co. Probably he would have made no further investigation of the records, for he knew that a limited part-

nership could not conduct a brokerage business after that date. Had he, however, been extra cautious and continued his search after July 1, 1917, he would have then gone to the records in the county recorder's office (an entirely separate office), and he would have found there no certificate of limited partnership of Marcuse & Co.

Hecht's and Finn's association with Marcuse was published to the world. Their names appeared on the stationery and cards of the company. Although the word "limited" appeared after their names, a most careful investigation would not have disclosed even an attempt to form a limited partnership. Anyone, therefore, dealing with that firm was entitled to do so relying on the public records and statutes of this state, and to deal with Marcuse & Co. on the faith of the unlimited liability of Hecht and Finn; and there is no warrant for saying customers did not do so.

Counsel for respondents speak of the hardship, and, as they call it, the "inequity of holding the respondents liable for the debts of Marcuse & Company." The hardship, if any, is having sustained losses in business—not in being required to pay their debts. The losses have been sustained. They must be borne, either by those who engaged in the business or their customers. If the losses were greater than they should have been, the responsibility rests on all the respondents, for they all had the right to examine and audit the books and dissolve the business. The losses will not be diminished by throwing them on creditors. The statutes of Illinois in substance provide that such losses, sustained through the operation of a brokerage business, are to be borne by the parties conducting that business and not by the creditors. In this proceeding the creditors are seeking to give effect to that statutory policy.

And so far as the hardship of this case is concerned, it is the creditors who are suffering hardship. Money was lost and dissipated by the firm, probably to the amount of $2,500,000. The creditors paid their money to the firm. They received nothing for it. The firm declared dividends out of the money so paid in. And they are here contending that not even those dividends need be returned. Is there any equity in favor of the limited partners as against the creditors? It is stated in respondents' brief that without the contributions of the special partners, if they had not gone into the enterprise, the firm could not have engaged in business. Marcuse states in his testimony that it was necessary to the enterprise that about $200,000 should be obtained from the special partners. (Rec., 444.)

If respondents had not come to his aid, Marcuse could not have organized the firm, or made a financial showing that would have entitled it to trade upon the New York Stock Exchange, or have published that fact for the purpose of drawing customers and obtaining their deposits. It was the action of these respondents and their contributions that enabled this ill-advised venture to start, that enabled it to act on the New York Stock Exchange and thereby obtain greater credit, that drew to the firm orders to purchase stocks and bonds and the deposit of the funds with which to make the purchases. Respondents were not novices. They knew what trading on the New York Stock Exchange meant. They knew that they were enabling Marcuse to open such an office and to obtain a standing on the New York Stock Exchange, and they expected to win great gains thereby. By Exhibits A and B they were all given the right to inspect the books, to receive balance sheets, to appoint auditors of the accounts and to close up the firm's business.

Yet, steadily for nearly three years the business was run at a loss. Their capital quickly disappeared and if they had performed the duty reserved to them of examining the books, having balance sheets and appointing auditors, they should have found that before a year was out all the capital had disappeared, the business was being conducted on misappropriated moneys and they were receiving dividends from misappropriated moneys. Respondents are far from blameless in this matter. They are not nearly as innocent as are the trusting customers and depositors who lost so much.

It was then the acts of these respondents that rendered possible the loss of the creditors' moneys, that rendered possible the squandering of the creditors' deposits. As between respondents and the creditors, the creditors have the greater equity. This case is in itself a sufficient reason for the Legislature of Illinois to forbid the formation of a corporation for brokerage purposes and to exclude brokerage firms from the privileges of the Limited Partnership Act.

If the court agrees with us that Section 11 has no application to a business not included within the scope of that act there will be no occasion to consider our further suggestions on that section. In our brief, however, we advanced other reasons why Section 11 was not available to relieve respondents from liability. Respondents have controverted those suggestions and we will now reply to the positions taken thereon by respondents.

An Intentionally False Certificate Cannot Be Made the Basis of an "Erroneous Belief."

Respondents insist that they "erroneously believed" that they were limited partners within the meaning of Section 11.

Let us assume for a moment that Section 11 is applicable to a partnership formed to conduct a brokerage business. Still Section 11 would not relieve the respondents from liability. In our main brief we presented the position of the creditors that Hecht and Finn were not trustees—that they had not a single right or title in the limited partnership that was not common to all respondents. In this position counsel for Hecht and Finn concur. They insist that the various instruments executed by the parties in giving final effect to their agreement must be construed together, and, as so construed, withdrew from Hecht and Finn any control over the trust fund and its income and did not give them any rights or obligations not shared in by the other respondents; in other words, that Hecht and Finn in signing the partnership agreement acted but as the *representatives* of themselves and associates for the purpose of obviating the rule of the New York Stock Exchange.

If counsel for Hecht and Finn are correct in this position that Vette *et al.* bore the same relation to the firm as did Hecht and Finn, then the certificate signed by Hecht and Finn was false, for it did not disclose that Vette *et al.* had contributed to the capital and had an interest in the business. It was knowingly made false and none of the respondents can avail himself of Section 11 to escape liability. For the purpose of this discussion we are assuming the partnership was for a purpose permitted by the Uniform Limited Partnership Act. The construction, therefore, placed by this court on Section 11 is highly important in the development of limited partnerships under the new limited act. That act, by reason of its general adoption, is practically a federal statute. Uniform interpretation is as desirable as uniform text. The high authority of this court will be controlling in all state courts. The important ques-

tion of statutory construction involved is whether or not parties, in order to avail themselves of Section 11, must not in good faith, without fraud, without concealment and without evasion, disclose in the statutory certificate the names of the parties affiliating together to form the limited partnership and the amount of their contributions.

The Uniform Limited Partnership Act, Section 2, provides that the persons desiring to form a limited partnership shall:

> "A. Sign and swear to a certificate which shall state:
>
> I. * * *
>
> II. * * *
>
> III. * * *
>
> IV. The name and place of residence of each member.
>
> V. * * *
>
> VI. The amount of cash * * * contributed by each limited partner."

The purpose of the Commissioners of Uniform Law in drafting and submitting the Uniform Limited Partnership Act, was a high and commendable purpose. They sought to give the business world a new vehicle of associating capital in commercial enterprises with limited liability of the associates. With that purpose we heartily sympathize. To make this vehicle more attractive and relieve partners from the penalty of general liability through mistakes in forming the association, Section 11 was inserted. Was Section 11 intended, however, to be a cloak or refuge for members of associations who launch their organization with initial concealment and misrepresentation as to the material statutory requirements. The statute does not require much, but one of these requirements is that they give the *names* and *addresses* of the members of the association and the *amount of capital contributed by each.*

Counsel for Vette and associates meet this point by contending that their clients were not members of the association. They refer to certain provisions of the agreement and cite certain cases in support of their position. In a later part of this reply we will comment on matters brought forth by them to sustain that position.

Counsel for Hecht and Finn assert and, we submit, demonstrate that the other respondents were as much members of the association as were Hecht and Finn. When they do so they admit that the statutory certificate *signed by their clients* was false in not disclosing the names of the other members of the association and false in its statements as to the amounts of the respective contributions.

In our main brief we pointed out reasons why the disclosure of the names of the members of the association was necessary and material. Whether or not the reasons suggested for the requirement are sufficient, *the statute does so require.* And we submit that when the parties have consciously, intentionally and deliberately prepared and filed a misleading statutory certificate, they could not have an "erroneous belief" that they were members of a limited partnership.

Otherwise parties associating themselves together in such an association could consciously ignore all statutory provisions, could intentionally make a false and misleading certificate and then, if the project was not successful, and disaster overtook them, "renounce" their interest in the partnership and claim exemption from liability under Section 11.

If limited partnerships under the new Uniform Limited Act are to serve a useful place in the commercial

world, sanction must not be given to the contention that they may be conceived in fraud and misrepresentation and then obtain immunity under Section 11. Under such a construction, Section 11, instead of being a salutary provision to relieve parties from the effect of inadvertent or unintentional omissions, would be perverted into a provision for relieving parties from their own wrong.

Amount of Tender.

In our brief we submitted that respondents had not shown a complete renunciation of all profits received by them from Marcuse & Company as all but Vette and Zuncker were creditors of Von Frantzius and entitled to receive their pro rata share of the 25 per cent of the profits which were to be segregated and set aside for the Von Frantzius creditors. In response to that position, counsel for respondents Vette *et al.*, urge that to claim the advantage of Section 11, it was not necessary for the respondents' to return *any* of the profits received by them. Their contention is that it was only necessary to "renounce" *future* profits and not profits previously received. This position is here advanced for the first time. Counsel for all parties previously proceeded on the assumption that under Section 11 it was necessary to return profits received in order to claim the advantage of that section. This unique position was undoubtedly suggested to counsel by the note in 71 Penn. Law Review reprinted in their appendix.

This claim is not in harmony with the act. The party seeking to avoid liability under Section 11 must "promptly renounce his interest in the profits of the business or other compensation by way of income." Renounce in this connection means to return, to redeliver,

to withdraw, and he must renounce or redeliver the profits of the business and also any other compensation that he has received by way of income, such as a salary.

When the statute requires that, in order to claim the benefit of Section 11, they must renounce their interests in the profits of the business, it must mean that they give up and return, for the benefit of creditors, profits received by them as well as their interest in future profits. If confined to the latter, it would be meaningless. The question would ordinarily only arise, as in this case, after insolvency, and to renounce interest in future profits of an insolvent concern already in bankruptcy, would be meaningless. The injustice of such a position, in fact the moral obliquity of it, is in keeping with this effort of respondents to keep everything they can, to hold on to profits acquired in violation of law, to hold on to dividends declared not from profits but from money deposited by the creditors, misappropriated moneys, and to leave the creditors in the lurch.

Counsel for Hecht and Finn meet the point by asserting there had been no distribution to the respondents of the 25 per cent of the profits allocated to Marcuse for the payment of the Von Frantzius creditors; they assert further that the Von Frantzius assets had not been liquidated at the time of the bankruptcy, and the amount of the deficit, if any, in that estate not ascertained. For this assertion they go outside the record. There is not a word in the record as to the liquidation of the Von Frantzius assets or what that estate paid or of the disposition made by Marcuse of the 25 per cent of the profits which were to go to him to apply on Von Frantzius certificates, before any dividend could be paid by the new firm.

In our brief we did not claim that the evidence showed

actual distribution by Marcuse of this 25 per cent of the profits. We did contend and again insist that respondents, in claiming exemption under Section 11, brought forward an affirmative defense and that the burden was upon them to prove they had renounced all interest in the profits before they could claim the advantage of that section. The evidence did show that all the respondents except Vette and Zuncker were substantial creditors of Von Frantzius, and that one of the cogent reasons for their embarking in the new enterprise was to secure payment of their debts from the Von Frantzius estate; that under the partnership agreement 25 per cent of the profits of Marcuse & Co. was to be paid over to Marcuse to be distributed among the Von Frantzius creditors; that, according to the books of Marcuse & Co., profits had accrued to that concern which had been distributed amongst the special partners and that therefore Marcuse must have received that 25 per cent of the profits for the Von Frantzius creditors and distributed that amount among the certificate holders. At any rate when it appeared from the documents that the respondents were entitled to their *pro rata* share of the 25 per cent of the profits so to be paid over to Marcuse, *the burden was upon them to prove* they had received no part of these profits or if received, to refund them. If they had received no part of the 25 per cent of profits, proof thereof would have been a simple matter. They presented an affirmative defense and failed to prove an essential fact necessary to establish that defense.

The further labored argument in the same brief that there is a distinction between the position of Hecht and others as creditors of Von Frantzius, and their position as limited partners, will not avail. One of the negotiations leading up to the partnership agreement, one of the principal agreements made in connection therewith,

was that respondents holding indebtedness certificates should receive dividends thereon through Marcuse *from the profits of the partnership enterprise.* The two things are so bound together, forming part of the same contract, one being an inducement to the other, that they cannot be separated. One of the profits of the business was the amount that each respondent received on account of what Von Frantzius owed him.

Position of Vette and Associates as to the Tender and Renunciation.

Counsel for Vette and others similarly situated, state that no one can seriously contend that Vette and the other respondents in his group are liable for the debts of Marcuse & Company if Hecht & Finn are not liable. This does not follow. If all the respondents became liable in the first instance for the debts of the partnership, and admitting (which we do not) that Section 11 was applicable to a brokerage partnership and that Hecht and Finn absolved themselves from liability by their renunciation, it seems clear that the other respondents who took no part in the renunciation and made no contribution to the tender did not absolve themselves from liability.

If necessary to return profits received in order to avail themselves of Section 11, the respondents other than Hecht and Finn certainly did not meet the requirement, for they retained and have to-day in their possession every cent of profits drawn by them from Marcuse & Company. There is no dispute as to this.

Even if a mere renunciation of future interests is adequate, they did not bring themselves under Section 11. Let us test this a moment. Assume that after the renunciation by Hecht and Finn there had been a sud-

den change in the market, and the securities in the possession of the receiver for Marcuse & Company had greatly appreciated and the partnership had become solvent and rich, Hecht and Finn by reason of their renunciation could not claim an interest in these profits. But what would bar the other respondents from claiming their interests. Not the renunciation of Hecht and Finn for we can search the Hecht-Finn agreement in vain for any authority of Hecht and Finn to renounce the interests of the other certificate holders in Marcuse & Co. If prior to the receivership and while Marcuse was still a going concern Hecht and Finn had attempted to make such a renunciation, the other respondents would have been quick to successfully disclaim the right of Hecht and Finn to make such renunciation. Not having authority in the Hecht-Finn agreement to make renunciation on behalf of the other respondents, Hecht and Finn before making the renunciation sought such authority from the other respondents. They declined to give it. (Rec., 658-9.)

When the bankruptcy petition was filed against Marcuse & Company, the respondents Vette and associates were forced to take their position. They either had to assert, as they did and have since done, that they were not partners with Hecht and Finn in Marcuse & Company, or claim that they "erroneously believed" they had become limited partners, renounce their interest and tender back the profits received. They elected to take the former position. They cannot now claim the advantage of the action of Hecht and Finn who elected to take the latter position.

Vette and associates and their counsel have persistently contended that they did not become and never thought they became limited partners.

Mr. Platt testified that before making the tender and renunciation on behalf of Hecht and Finn, he conferred with Mr. Miller and Mr. Defrees representing the other respondents, seeking authority to make the tender and renunciation on behalf of the other respondents, and that they declined to give this authority. On cross-examination Mr. Miller asked Mr. Platt (Rec., 660):

> "Q. Do you remember my saying to you that from my viewpoint the men I represented were not limited or special partners of the firm?
>
> A. I remember your saying that."

Mr. Miller later asked Mr. Platt if he did not recall Mr. Defrees saying that his position was substantially the same as Mr. Miller's, and Mr. Platt testified that he did so recall. (Rec., 661.) Counsel for Vette *et al.*, from the very first, therefore, took the position that their clients were not limited partners and refused to return the profits received or permit renunciation to be made in their name. They took the same position in the Circuit Court of Appeals and have taken the same position in this court. How then can they claim the advantage of the statute relating to those who erroneously believe they *had become* limited partners in a limited partnership?

It is not unusual that one must elect as to which of two inconsistent positions he will take. Having so elected he must stand by that position.

Section 11 has no place in this case. It was intended to apply only to partnerships within the scope of that act and even if otherwise applicable respondents have not availed themselves of that section.

All Respondents Are Equally Liable.

In our main brief we pointed out the essential identity of the relations of Hecht and Finn and the other respondents to the partnership. Counsel for Hecht and Finn concur in this position and have demonstrated the entire lack of any trust relation between Hecht and Finn and the other respondents. They particularly call attention to the provision in the Hecht-Finn agreement by which the partnership articles are incorporated therein as if set out *haec verba*, and the provision in the Hecht-Finn agreement that the holders of the certificates provided for by that agreement should become parties thereto as if they had individually signed the agreement. We submit for the reasons given in our main brief and elaborated in the argument for Hecht and Finn, that there was an identity of rights and obligations among Hecht, Finn and the other respondents.

Counsel for Vette and associates take the position that, although Hecht and Finn may be liable as special partners, the other respondents, not being specifically named in or having specifically executed the partnership articles (although by the provisions just referred to their rights are fixed as if they had in fact done so) occupy a different relation to the partnership and are not liable as general partners. We will not repeat our former arguments showing the identify of the relation, but wish to comment on one or two matters brought forward by counsel for the respondents, Vette and associates, in support of their position.

Paragraph 6 of the Hecht-Finn Agreement.

Counsel for Vette and associates, set forth at length and place great reliance on Section 6 of the Hecht-Finn agreement. (Brief, pp. 7, 78 *et seq.*) Section 6 contains a *recital* that the holders of the trust certificates shall have no right, title or interest in the copartnership, its property or assets and shall not be construed to have assumed any liability in respect to the copartnership.

This section does not purport to take from the certificate holders a single right given them under other provisions of the contract. It is squarely inconsistent with the other provisions of that agreement. That agreement gives Vette *et al.* the right without "interference, interruption or hindrance" by Hecht and Finn, or the general partners, to have access to the books of account of the copartnership; they are to be furnished yearly inventories and accounts; they are to be furnished monthly trial balances of the partnership; they may take part in appointing auditors to audit the business; they may dissolve the copartnership, and they may, if Hecht and Finn refuse to do so on request, bring suit in their own name or otherwise to dissolve the partnership. Not one of these rights is taken away by Section 6. The declaration in the latter part of Section 6 that the interest of these respondents shall be considered personal property and assignable, is again but conferring on these respondents, specifically, another of the rights of a special partner (and a right overlooked by us in our main brief in calling attention to the identity of the rights of these respondents and special partners). The Uniform Limited Act (Sections 18 and 19) expressly provides that a limited partner's interest in the partnership is personal prop-

erty and assignable. (Cahill's Illinois Revised Statute, Chap. 106a, pars. 62 and 63.)

With admirable fairness the Hecht-Finn agreement (Section 8) provides that Hecht and Finn shall not by virtue of being parties to the Hecht-Finn agreement *or the partnership agreement* be liable for anything. If Hecht and Finn by executing the partnership agreement, entered into such a relation with Marcuse and Morris that they became general partners in the partnership enterprise and liable to creditors for the debts thereof, no recital in another agreement between Hecht and Finn and Vette and associates can relieve them of this liability. If the relationship assumed by the certificate holders under the Hecht-Finn agreement is such as to impose partnership liability on them, recitals of no liability are as futile to relieve these respondents from liability to the creditors as are the recitals in Section 8 to relieve Hecht and Finn.

There Was No Change of Plan for Forming the Partnership Between April 2 and June 30, 1917.

In our brief (pp. 31-38) we gathered and presented extracts from the record showing that the purpose of all the respondents to join a partnership to take up and carry on the brokerage business theretofore conducted by Von Frantzius, never changed and that only the form of it was varied. We believe that testimony established our position beyond a doubt. We stated, however, that there was a little testimony to the contrary and on page 38 mentioned the testimony of Buckingham, Hoffman and Robertson, and thus stated plainly that there was a conflict in the testimony on this point.

The extracts from the testimony used by us were most fairly presented and were in large part the testimony

of respondents and their partner Marcuse, with some extracts from the testimony of their lawyer, Hoffman.

Counsel for Vette and others in their brief cast aside entirely the evidence so quoted by us, and insist that the evidence of Buckingham, Hoffman and Robertson shows that the plan of the articles of April 2nd was entirely abandoned and an entirely new plan was devised and embodied in the partnership articles and Hecht-Finn agreement signed June 30th.

On page 13 of the brief filed by Messrs. Miller and Buckingham it is stated that "there is no conflict of evidence as to any material fact." This sentence follows a statement on pages 5, 6 and 7 of the same brief regarding what is called "A change of attitude," and plainly refers to the point now under discussion. The change of attitude is evidently considered by counsel for respondents as a most material fact. Again and again they say that the arrangement of April 2nd was abandoned and the alleged entirely new and different arrangement of June 30th taken up. The overwhelming evidence is that there was no change of attitude and that the same scheme or arrangement persisted throughout the time referred to, and practically the same articles with necessary changes and with the *unchanged* date.

But all the testimony we pointed out in our brief is disregarded and on pages 5 and 6 of their argument relating to this so-called "change of attitude" there are many references to the record purporting to support the point that there was a change of attitude. Almost all those references, however, are to the testimony of Buckingham, Hoffman and Robertson. Buckingham is counsel in this case for the Studebakers. Hoffman was a lawyer in the office of Buckingham. Robertson was an attorney for Vette and Zuncker. We insist

that the testimony of these three individuals was directly contradicted by the testimony referred to in our main brief on this point.

In their so-called "more comprehensive statement of facts" counsel for Vette *et al.*, under the subheading "Change of Attitude" (Brief, p. 5), assume that there is no testimony in the case as to reasons for changing the form of the agreement other than that of Buckingham and his associate lawyers. But Marcuse, Finn, Regensteiner and Zuncker all testified at length as to the reasons for changing the original partnership articles into the form finally adopted. Their testimony contradicts Buckingham's testimony. Marcuse testified that none of the respondents or their counsel at any time gave any reason for the change in the form of the partnership articles other than the rule of the New York Stock Exchange. Hoffman specifically testified that in the revision of the papers he did not understand that Hecht and Finn's liability would be any different from that of the other respondents. (Rec., 687.)

In an attempt to break the weight of petitioners' evidence on this point, counsel, on pages 122 to 124 of their brief, charge that we have on pp. 31-38 of our brief, unfairly grouped our excerpts from the testimony. They also charge that we have not fully stated the context from which the quotations came. And on pages 58 to 95 of the second volume of their brief (called an appendix) they try to point out something to sustain their charge and to find place for further argument. In trying to so point out something, they miserably fail, they cavil on irrelevant points and show that our excerpts were properly made. There is absolutely no ground whatsoever for their criticism. No excerpts were ever more fairly made.

On the other hand, however, counsel were not justified in saying "There is no conflict of evidence as to any material fact." This is especially true when *their* clients testified to a different state of facts and said the only reason they remembered for the difference between the agreements of April 2nd and June 30th was the rule of the New York Stock Exchange. Indeed, in writing their brief Mr. Miller and Mr. Buckingham gave entirely too much prominence and weight to Buckingham's testimony. The testimony quoted by us was entitled to great weight as much of it was given against interest. The testimony of Buckingham, Hoffman and Robertson was that of interested parties. They were the three lawyers who represented most of the respondents in the making of the partnership articles. They were, therefore, largely interested in the case. We cannot imagine a greater interest a witness could have than that of a lawyer trying to extricate his client from a difficult position into which he had entered under his advice.

Certainly the District Court had a right under such circumstances to find that there had been no change of attitude and that finding was involved in holding all the respondents to be general partners of Marcuse.

All Respondents Had All Rights of Limited Partners.

In our original brief we pointed out that every right of a limited partner was, by the various documents, conferred upon all respondents. In that discussion we referred to the act of 1874 in defining the rights of a limited partner. If as urged by counsel for respondents, Vette and associates, the act of 1874 must be disregarded in determining the rights of the parties and only the act of 1917 considered, the result is exactly the same.

In Section 10 of the act of 1917, the rights of a limited partner are defined. Those rights are: to inspect the partnership books; receive formal accounts of the partnership affairs; secure dissolution by decree of court; and to share in the profits (Cahill's Ill. Statutes, Chap. 106-a, par. 54). All these rights respondents had. In our main brief we challenged counsel for respondents to point out a single substantial right of a limited partnership, that was not given *all respondents* by the limited partnership agreement, the Hecht-Finn agreement and the consent of the general partners to the Hecht-Finn agreement. They did not indicate a single right of a limited partner under either the act of 1874 or 1917 which were not conferred upon *all* the respondents in this case.

In this connection we wish to comment on the case of *Crehan* v. *Megargel*, 234 N. Y. 67, cited and relied on in both briefs filed for respondents.

In the *Crehan* case the agreement under which the subscribers contributed part of the funds which went into the partnership expressly provided that the subscribers were "to have no right of accounting or other rights whatsoever against the said partnership, * * *" but were "in all respects to be strangers thereto." This clause is substantially the only provision from the agreement quoted by the New York court, which held that, under that agreement, no rights of special partners were reserved or attempted to be reserved to the subscribers to the funds and that, therefore, they acquired no rights in or to the special partnership and were not persons "interested therein." In its opinion the court says further:

> "Of course we do not intend to negative the proposition made by the plaintiff that an arrangement might be made by one who was not named as spe-

> cial partner which would be so designated to evade the statute *and give him the rights of that status*, that he would be held liable under the penalties of the law."

The court added that such was the basis of the decision in *Buckley* v. *Lord*, 24 How. Prac. 455.

Turning to the *Buckley* case, we find that in that case the special partnership agreement was signed by Marks and part of the capital contributed by Bramhall. The special partnership agreement contained the following provision:

> "As a matter of courtesy to Mr. E. C. Bramhall of Jersey City, for the interest he has manifested in the welfare of this copartnership, and his assistance in the advancement of its interests, we invite him, at all times, or at such times as may suit his convenience, to examine into our business affairs."

The court held that this apparently innocent language was merely an attempt to evade the statute and give Bramhall the rights of a special partner without disclosing in the recorded papers his connection with the partnership.

As we have heretofore shown the right to inquire into the partnership affairs, examine the corporate books, secure monthly and annual reports and audits, to appoint auditors and to dissolve the business, were all reserved to the contributors to the fund. The rights which were expressly denied the contributors in the *Crehan* case were given them in the case at bar. The rights which, in the *Buckley* case the New York court held gave them the *status* of special partners, in evasion of the statute, were conferred upon them in this case.

The case at bar is further distinguishable from the *Megargel* case in this: In the present case there was a valid executed agreement of partnership between all the respondents placed in escrow to wait the acquisition of

the assets of the Von Frantzius estate. That document evidenced exactly the intentions of the parties. Had it been delivered and acted upon, it would have created a partnership. The intention to form a partnership was therefore fixed and conceded and continued from that time down to the time of bankruptcy, unchanged in attitude or condition. Nearly all the witnesses specifically stated that the scheme was altered only by the New York Exchange rule concerning limited partnerships. The intention of the partners did not change and never changed until bankruptcy, as is particularly shown by the acceptance of the 4 per cent dividend direct from Marcuse instead of through the Chicago Title & Trust Company, which was the only trustee under that trust agreement. Taking the scheme as a whole, including the three principal documents (2 partnership agreements and the Hecht-Finn agrement) we have a state of facts entirely different from those in the *Megargel* case, a state of affairs from which the District Court was justified in finding that these parties were all partners and in disregarding the so-called "Hecht-Finn Trust."

In *Pooley* v. *Driver*, 5 Ch. Div. p. 458, Jessel, Master of the Rolls, considered at length, with an extensive review of the authorities both under the common and civil law, the effect of attempting to give one all the rights of a partner without the attending liabilities.

In that case in which the partnership had raised part of its capital by the sale of certificates which entitled the holders to share in the profits of the business but attempted to protect them against the liabilities of the partners, he said, among other things (p. 482):

> "I put it to the learned counsel, in the course of the argument, whether they could suggest any right which would be given to an ordinary dormant partner, not possessed by these contributors, and after

consideration and discussion, they were unable to do so. That is the general effect of the deeds."

And then, after pointing out further how the contributors had all the rights of a partner, he continued:

"Well, if that is so, is not that exactly the thing which it was intended should not take place—that a man should not put forward another to carry on the business ostensibly and himself take the profits? It is the very object and meaning of the transaction, as I understand it, to give these contributors that very position which dormant partners usually occupy, with certain collateral advantages—exceptional, perhaps, but not altogether unusual; unusual, no doubt, in the sense that I have seldom seen—I was going to say so barefaced, but, when you come to see the reason of it, I will say so palpable—an intention exhibited on the face of the documents to give the contributors all the benefits of the partnership, and if possible to secure them from suffering from the liabilities."

And in conclusion he stated (p. 493):

"It is an elaborate device, an ingenious contrivance, for giving these contributors the whole of the advantages of the partnership, without subjecting them, as they thought, to any of the liabilities. I think the device fails; and that, looking at the law as it stands, I must hold that they are partners, and liable to the consequences of being partners, and to the whole of the engagements of the partnership, and consequently liable for the whole of its debts."

Massachusetts Trust Doctrine.

Counsel for Vette and others suggest that the relationship between Hecht and Finn and the other respondents under the Hecht-Finn agreement was in the nature of a so-called "Massachusetts Trust." In our brief we did not discuss the Massachusetts Trust doctrine. It was not necessary to do so.

There is no place in this controversy for the doctrine

of the so-called "Massachusetts Trust." Such a trust has nothing peculiar about it and rests upon general trust doctrines. If a fund is given over to one or two trustees who have the complete custody and power of disposition of it, who are to manage it and to disburse the net profits received therefrom, there may be an element of trust, and the managers may be called trustees. But Hecht and Finn had no power over profits, or even over principal on dissolution of the partnership; they were not to receive the principal; they had absolutely no power that the other respondents did not have.

Respondents are mistaken in stating several times in their brief (page 107) that the only interest of the respondents other than Hecht and Finn in the partnership profits and assets was through Hecht and Finn. These latter were not trustees. The only trustee in the trust agreement was the Chicago Title & Trust Company. Its duty was to receive direct from Marcuse & Company all the profits and distribute them ratably among all *seven* of the special partners. It was the same way with the *corpus* of the estate upon dissolution. Hecht and Finn could only receive that which belonged to them. The share of Zuncker and the other respondents never could pass through the hands of Hecht and Finn. The certificate holders had an equitable interest in the assets and profits of Marcuse & Company and could have recovered that interest in a court of equity. Every one of them had a right to an accounting and to a decree for his share of the net profits. Hecht and Finn were not trustees.

It is not necessary to analyze in detail the cases cited by counsel on this point. It is sufficient to call attention to the fact that in each of those cases where it was held there was a true Massachusetts Trust, there was property given the trustees over which they had the sole do-

minion for the purpose of investing or trading. The trustees had broad comprehensive powers and were not subject to the control in any substantial manner of the *cestuis.*

In *Williams* v. *Milton,* 215 Mass. 1, cited and so strongly relied on by counsel, Justice Loring in distinguishing between the cases which held that the relationship created a partnership, and those cases where the relation created was not a partnership, said that the difference

> "lies in the fact that in the former cases the certificate holders are associated together by the terms of the 'trust' and are the principals whose instructions are to be obeyed by their agent, who for their convenience holds the legal title to their property. The property is their property; they are the masters; while in *Mayo* v. *Moritz,* on the other hand, there is no association between the certificate holders. The property is the property of the trustees and the trustees are the masters."

Applying the distinction laid down in that case, even in Massachusetts there would be no element of the so-called Massachusetts trust in this case. There is no property in the hands of Hecht and Finn of which they are the masters.

As pointed out in our main brief, however, the Massachusetts Trust doctrine is not recognized in Illinois, but in this state joint stock companies are partnerships. (Brief, p. 90.) Counsel for Hecht and Finn cited additional Illinois cases to the same effect. (Their Brief, pp. 45, 46.)

Subpartnership.

As an alternative to the Massachusetts Trust theory, counsel for Hecht and Finn suggest a subpartnership between Hecht and Finn and respondents Vette *et al.*

There was no element of subpartnership in the document. The relation of Hecht and of Vette and Finn and of the Studebakers to the firm was exactly the same.

Again it is not necessary to analyze the cases cited in detail. It is sufficient to point out that in none of the cases cited do the facts bear the slightest relationship to the case at bar, and particularly that in not a single case cited did the so-called subpartner have any rights in the partnership whatsoever, such as the right to examine the books, have an accounting and to dissolve the main partnership. In fact, in the very quotations cited by counsel on page 108 and following of their brief, it appears clearly that such rights in the main partnership are inconsistent with a subpartnership. For instance, in the quotation from Meachem (Brief, p. 108) it is said "And he (the subpartner) has no rights of accounting against the original firm." In the last paragraph in the quotation from Bates (Brief, p. 109) it is stated that the subpartner has no such community of interest in the profits as to compel an accounting from the partnership. In the quotation from Cyc. of Law and Procedure (Brief, p. 109) it is again said, "He (the special partner) has no right to an account as a partner."

Under point A, beginning on page 78 of their brief, counsel for Vette *et al.* argue at length that the Hecht-Finn agreement did not make Vette and others partners with Hecht and Finn. That is not the question. The question is whether the partnership agreement and the Hecht-Finn agreement made Hecht, Finn and the other defendants partners with Marcuse and Morris. It has been the position of the creditors throughout that Hecht and Finn became general partners with Marcuse & Co. and that in the language of the district judge who tried the case, "That Hecht and Finn, in fact, were Hecht

and Finn, Vette, * * * Regensteiner, the Hecht-Finn Trust, the Studebaker Trust as Clement and George Studebaker; * * * They were all of these people." In other words, again in the language of the findings of the District Court "that these so-called 'special partners,' selected,—all of them selected Hecht and Finn as the agents for the operation of the special partnership by and through Hecht and Finn."

The many long and devious courses suggested by respondents' counsel through which money must pass from this partnership to the various respondents, including the Studebakers, are advanced only to mislead. Dividends were declared by Marcuse & Company and distributed by the Chicago Title & Trust Co. as trustee. To say that they were dividends when they came to the hands of the trustee, but trust funds when distributed by it to the various respondents means nothing. The profits of the enterprise were paid directly to the Chicago Title & Trust Co. for distribution as dividends to these respondents. There is no way of quoting the record, no way of calling the funds dividends at one time and trust funds at another, that will cast any cloud upon the plain, evident transaction. Both the Studebakers accepted through the Studebaker Bros. Trust the dividends declared during the three years, and it is too late for either of them to now say that he was not party to the agreement.

The Limited Partnership Failing, it Necessarily Follows that the Respondents Were General Partners.

Counsel for Vette and associates submit extensive arguments that, even if Section 11 has no application to this brokerage firm, none of the respondents became liable as general partners. This view was expressed

also in the majority opinion in the Circuit Court of Appeals. This contention we discussed in our main brief (page 74), and we do not intend to repeat arguments there presented. We will only answer one or two points urged by counsel in support of their position.

Intent.

They urge that "*intent*" is the determining factor, and if respondents did not intend to become *general partners*, although they entered into an association containing all the elements of a general partnership, they did not become general partners.

It is true that "intent" is an element in determining whether or not a partnership exists. In our main brief (p. 79, *et seq.*) we cited cases and text books to the effect that the "intention" material in ascertaining whether a partnership exists, is the intention to enter into such a relation that the law attaches to it the obligations of a partnership. In addition to those citations we call attention to the following statements taken, in part, from cases cited by counsel in support of the position, that an "intent" to form a partnership is a condition requisite to the formation of a partnership.

In *Beecher* v. *Bush*, 45 Mich. 188, cited by counsel for Vette and others (Brief, p. 77), Judge Cooley, in discussing the element of intent as a criterion of partnership, said:

> "It is possible for parties to intend no partnership and yet form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements and names go for nothing when the substance of the agreement shows them to be inapplicable."

In *Carter, Dunbar & Co.* v. *McClure, Lucas & Co.* 98 Tenn. 109, in holding that the members of a so-called joint stock company were partners, the court said:

> "Were these parties engaged in a partnership enterprise? All of the defendants earnestly disclaim any purpose of entering upon such an undertaking. * * * It is no doubt true that the defendants did not contemplate a partnership and each supposed that he was simply taking a share in a joint stock enterprise in which all he risked was the small sum paid for such share; yet it is for the law to determine on the facts already given whether a partnership was created with all its attending liabilities."

In *Pooley* v. *Driver*, 5th Ch. Div. 458 at 483, Jessel, master of the rolls, said:

> "It was said, and said with considerable force, by Mr. Chitty and Mr. Mathew, that they never intended to be partners. What they did not intend to do, was to incur the liabilities of partners. If intending to be a partner is intending to take the profits, then they did intend to be partners. If intending to take the profits and have the business carried on for their benefit was intending to be partners, they did intend to be partners. If intending to see that the money was applied for that purpose, and for no other, and to exercise an efficient control over it, so that they might have brought an action to restrain it from being otherwise applied, and so forth, was intending to be partners, then they did intend to be partners."

In *In Re Hoyne*, 277 Fed. 668, in commenting on Sections 6 and 7 of the Uniform Partnership Act, the court said (p. 674):

> "Intent is a factor that may be considered in any finding of fact. True, intent must be gathered from the acts of the parties, and not from an unlawful desire to avoid liability; that is to say, the parties may intend to avoid liability, and may fail to do so because their acts and their contract establish a *status* from which liability as a partner follows."

If the interpretation placed by the Circuit Court of Appeals on the Uniform General Partnership Act, that, under that act, although parties may have intended to enter into a relationship with all the incidents of a partnership, if they did not intend to become partners among themselves, they are not partners as to third persons is to stand, it works such a radical change in the law of partnership that no doubt those states where it has been adopted will wish to amend their act.

Agency.

Counsel suggests another test of partnership is agency (Brief, pp. 67 and 101), and urge that that element was lacking as none of the respondents, including Hecht and Finn, has authority to hire clerks or buy postage stamps for Marcuse & Company.

As pointed out by Mr. Justice GRAY in *Meehan* v. *Valentine*, 145 U. S. 611, agency is a *result* rather than a *test* of partnership.

It is possible for the partners, in their partnership articles, to contract that the management of the business be vested in one of the partners.

In Lindley on Partnerships, 8th Edition, 362, in commenting on the relationship of agency between the partners, it is said:

> "It need, however, hardly be observed that it is perfectly competent for parties to agree that the management of the partnership affairs shall be confided to one or more of their number exclusively of the others."

Beginning on page 88, counsel for Vette and others take up *seriatim* the various rights and obligations which the instruments vested in or imposed on respondents and attempted to demonstrate that no one of these elements is sufficient to create a partnership. This is the old and

often criticised method of breaking the twigs separately. It is immaterial whether *any one* of these rights and obligations separately created a partnership. The question is whether *all of them together* created such a relation between the parties as constituted them partners.

We have an association together, contribution of capital, a business conducted for their joint profit, a sharing of profits, a sharing in losses, access to the books, right to audit the business and, in certain contingencies, to dissolve the business. All these elements together, both at common law and under the statute, create a general partnership.

Right to Contribution Among Partners as a Test of Partnership.

Counsel for Vette propose as another test of partnership the question whether, if Marcuse paid the debts of the firm, he could recover contributions from Hecht, Finn and the others. Right of contribution for losses sustained is, of course, an attribute of partnership. It is competent for the partners, however, by contract, to agree on the proportion in which profits or losses shall be shared. As between themselves such a contract controls. Contracts between partners limiting the liability of any partner to a definite amount does not limit his liability to creditors as a general partner.

A more pertinent question is whether, if creditors, ignorant of the relation of Vette and his associates to the partnership, sued and recovered their claims from Hecht and Finn, the latter could enforce contribution from Vette and associates on equitable principles. We submit that there would be such right of contribution, and, if so, Vette and the other respondents should be held directly liable to creditors in the first instance.

We again submit that both at common law and under the Uniform (General) Partnership Act, the limited partnership failing, respondents became general partners, and that the Uniform (General) Partnership Act meant to work no such drastic change in the law of partnership as is attributed to it by the majority opinion in the Circuit Court of Appeals and contended for by counsel for respondents.

Paragraph 2 of Section 6 of the Uniform Partnership Act.

Counsel for Hecht and Finn quote and rely on a provision in the Uniform (General) Partnership Act not previously referred to. This provision is paragraph 2 of Section 6 of that act. It is set out on page 31 of their brief. That section has no application to this case. If it did it would but confirm our position.

Part of the explanatory note submitted by the Commissioners on Uniform State Laws on this section is as follows (Vol. 8, Uniform Laws Ann., p. 13):

> "The paragraph as drawn makes any association formed under a statute a partnership if it would have been a partnership in the state if the act had not been adopted. If the association would not have been a partnership had the act not been adopted, the adoption of the act does not make it a partnership. In short, the adoption of the act does not change the legal status in the state of any association formed under a statute."

In other words, it was not intended, by legislation, to convert into a partnership associations which had been doing business for many years before the passage of the act and which had not theretofore been legal partnerships; such associations for instance as the American Express Co. or a Massachusetts Trust.

If applicable to the present situation, paragraph 2 of Section 6 supports our position.

The section in question occurs in the Uniform General Partnership Act. The act of 1874 was repealed except as to existing partnerships by the new Limited Partnership Act. The 1874 act having been repealed prior to recording the certificate of limited partnership in this case, and the new limited act expressly prohibiting the formation of limited partnerships for a brokerage business and no effort having been made to comply with the new act, the inchoate limited partnership involved would be a general partnership.

That is to say, if Section 6 is applicable at all, then under its provisions whether this partnership became a limited partnership must be governed solely by the law as it was before our Uniform General Partnership Act took effect and without reference to it. Under the Illinois decisions (our Brief, pp. 81, 83), the attempt to form a limited partnership failing for noncompliance with the statute, the purported limited partners became general partners.

Recording the Certificate on July 2nd Was Not a Compliance With the Limited Act of 1874.

In the brief submitted for Hecht and Finn it is suggested that the act of 1874 should be extended beyond July 1, 1917, for the purpose of permitting the filing of a certificate of limited partnership after that date, in spite of the express repeal provision in the act of 1917. How long beyond July 1st should the time be extended —a day, a week, a month or a year? What authority is there for such an extension? It is asserted that the afternoon of Saturday, June 30th, was a legal holiday in Illinois and the county clerk's office was closed. This

is, of course, entirely outside the record. There is not a word of evidence that the county clerk's office was closed on Saturday afternoon, June 30th. Counsel point to no statutory provision as to Saturday afternoon being a legal holiday in Illinois. The only statutory provision we have found is one in connection with the presentation and protesting of negotiable paper. (Cahill's Ill. St. Ch. 98, Sec. 17.) If it is a mater of such general knowledge that the county clerk's office in Chicago was closed on Saturday afternoon, that this court will take judicial notice thereof, then counsel should have been aware of its closing and completed their work in time to file the certificate before the office closed. So far as the record shows, no effort whatsoever was made to file the certificate before July 2nd.

The parties had been working on the formation of this limited partnership from early in April. At that time the statute gave them the privilege of forming a limited partnership to conduct a brokerage business. If they wished to avail themselves of that privilege, it was for them to do so before the statute was repealed and the privilege withdrawn. Anyone interested in investigating the nature of this association was required to examine the records in the county clerk's office up to and including June 30th only. Finding no certificate on file up to that date, he would act accordingly and was not required to return at some other vague indefinite time to see if a certificate had been filed after the repeal of the act.

There is no merit in the contention that filing the certificate on July 2nd, was a compliance with the 1874 statute.

Effect of Paragraph 3 of Section 28 of the New Limited Partnership Act.

Counsel for Hecht and Finn quote paragraph 3 of Section 28 of the Uniform Limited Act as in some way bearing on the subject. They discuss it but little, and it is not mentioned by counsel for other respondents.

That paragraph is:

> "This act shall not be so construed as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect."

The section has no application to this case. It is a stock paragraph inserted in many of the uniform acts and in many codes.

The first clause, that the act shall not be construed as to impair the obligation of any contract, adds nothing to the act. It saves to respondents no rights which would not be saved were it not in the statute. No state legislation can impair the obligation of a contract.

The question can, therefore, be restated as follows: If this clause were not in the new act and on July 1st there had gone into effect the new act prohibiting the formation of limited partnerships to do a brokerage business, or simply repealing the prior act which authorized partnerships for that purpose, would the new act or the repealing act be unconstitutional as impairing the obligation of a contract looking to the formation of a limited partnership for such a purpose?

The statement of the question answers it. The right to form a limited partnership is a privilege given by the state. It can be withdrawn at any time. Withdrawal of the privilege is not unconstitutional as impairing a contract between parties planning to avail themselves of that privilege.

That while the passage of a general law may have the incidental effect of rendering impossible of performance contracts entered into under the old law, such laws do not impair the obligations of contracts has been repeatedly held by this court. (*Louisville and Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, *Thornton* v. *Duffy*, 254 U. S. 361.)

The next clause "nor to affect any actions or proceedings begun," means, of course, actions or proceedings at law.

There is identically the same provision in the Uniform General Partnership Act (Sec. 28). The commissioners' explanatory note submitted with that provision is (7 Uniform Laws Annotated, p. 9):

> "The wording is based on the American Codes. (Idaho Rev. Codes, Section 4; Cal. C. C., Section 4; Rev. Stat. of Colo. (1908), Sections 467, 468; Gen. Stat. of Kans. (1905), 1633; 1 Burns Anno. Ind. Stat. (1908), Sections 240, 241, 1356, 1359; Cobbey's Rev. Stat. Neb. 11, 363; 2 S. Dak. Comp. Laws (1908), 313, 316, 318.)"

A reference to the codes referred to clearly indicates that it is a saving clause to preserve actions or proceedings at law commenced prior to the passage of the act. The provision in the Kansas code for instance uses the expression "rights accrued or actions *pending*." The California Civil Code referred to provides:

> "No action or proceeding commenced before this code takes effect and no right accrued is affected by its provisions."

The Uniform Sales Act (Sec. 76) and the Uniform Negotiable Instruments Act (Sec. 190) define the word action as used in those acts as including counterclaim and setoff.

"Proceedings" is used in apposition with action and

means the same thing, that is, legal proceedings. The phrase, "or right accrued" adds nothing.

Not only do counsel for Vette and associates not cite or rely on this provision, but their whole argument is based on the assumption that the respondents on July 2, 1917, were attempting to form a special partnership at that time and that all the rights and liabilities must be judged under that statute without reference to anything that had been done before.

In their brief counsel for Vette say (pp. 42-43):

> "At the time the act of 1917 became effective Marcuse & Co. was not a limited partnership 'formed under any statute of this state prior to the adoption' of the 1917 act. The attempted limited partnership in so far as it had progressed prior to July 1, 1917, was in *process* of organization."

Correction of Various Statements in Respondents' Briefs.

The Pleadings.

Counsel for respondents err as to the pleadings. They all state that the bankruptcy petition was based upon the documents afterward offered in this case and the failure to file the limited partnership articles prior to the repeal of the statute. The original bankruptcy petition filed by Giles *et al.*, on March 11, 1920, alleged that Marcuse, Morris, Finn and Hecht, co-partners doing business as Marcuse & Company, were insolvent and asked that they be adjudicated bankrupts. (Rec., 33.)

The following day Meyer and others filed an intervening petition adopting the allegations of the original petition. (Rec., 35.) On March 15th, one Lachman filed an intervening petition. This was not a petition for ad-

judication of bankruptcy, but for an order on the receiver to take possession of the assets of Finn and Hecht as well as Marcuse and Morris. This intervening petition set forth the limited partnership agreement between Marcuse, Morris, Finn and Hecht, and the failure to file the limited partnership certificate. (Rec., 42.)

Hecht and Finn answered this petition, separately, denying they were general partners and opposing the order for the receivers to take possession of their assets. (Rec., 56, 62.) They also filed separate answers to the bankruptcy petition, setting forth at length their claim that they were but limited partners, and the renunciation they had made on March 17th. (Rec., 71, 78.) Finn later filed an amendment asserting that in signing the partnership articles he and Hecht were acting also for the other respondents, and, while denying that Hecht and himself had become general partners, asserting that if they were general partners, the other respondents were equally liable. By this amendment, the Hecht-Finn agreement was for the first time pleaded. This amendment prayed for process against the other respondents and on this amended answer the subpoenas were issued by which Vette and his associates were brought into court. (Rec., 110.)

With these facts before them, the original and intervening petitioners filed, on April 30th, an amended bankruptcy petition. (Rec., 184.) This amended petition merely alleged that the ten men, Marcuse, Morris, Finn, Hecht, Vette, Zuncker, Regensteiner, Hoffman, Clement Studebaker, Jr., and George M. Studebaker, doing business under the name of Marcuse & Company, were insolvent and had committed an act of bankruptcy, and prayed that they be adjudicated bankrupts. None of the facts or documents included in the Lachman petition

or the answers thereto were set out in this petition and under this petition the petitioning creditors *could prove any facts tending* to show the respondents thereto were partners and insolvent.

Approval of the New York Stock Exchange.

Counsel for Hecht and Finn state (Brief, p. 7) that the parties were advised that the papers which they finally executed complied with the requirements of the New York Stock Exchange and were properly executed to form a limited partnership without liability on the part of anyone except the general partners. If they intend to imply the documents were submitted to the Stock Exchange authorities and they were advised by those authorities they were satisfactory, there is nothing in the record on which this statement can be based. All that the record shows is that Marcuse & Company was admitted to trading on the New York Stock Exchange. As to what, if any, papers were submitted there was not a word of testimony.

Summary.

Summarizing our position: All the respondents agreed to enter into a partnership with Marcuse and Morris to conduct a brokerage business. They planned a limited partnership under the old Illinois statute permitting a limited partnership for brokerage purposes. After the negotiations had proceeded to the point of execution of the papers, it was then found impracticable to carry out this plan because of the rule of the New York Stock Exchange. To obviate this rule, the form of the papers was changed—the essential rights in every particular remaining the same. Under the new form only Hecht and Finn appeared as special partners, but

by another document incorporating the partnership articles and executed contemporaneously with the partnership articles, the other respondents were given all the rights that they had under the prior document; they made the same contributions to the capital; had the same interest in the profits; were to bear the same proportion of the losses, and had the same access to the books and the same right to cause the business to be liquidated.

They failed to perfect the limited partnership under the Illinois Act of 1874. The statutory certificate, filing of which was expressly made a condition precedent to the formation of a limited partnership under that act, was not filed until after the repeal of that act, and the partnership certificate was not true.

The organization did not become a limited partnership under the Uniform Limited Partnership Act of 1917, as that statute expressly precluded the formation thereunder of a partnership to conduct a brokerage business, and no attempt was made to comply with that act.

Nevertheless on July 2, 1917, they began operating in Chicago a brokerage business and carried on that business for almost three years. During all of that time under the laws of Illinois, that brokerage business could be conducted only as a general partnership. This is the declared statutory policy of Illinois for the protection of customers of such a business.

They intended to enter into a partnership relation. In failing to secure a statutory limitation of liability, they necessarily both at common law and under the Uniform Partnership Act became general partners.

Having become general partners in the first instance, none of them relieved themselves from liability by the renunciation under Section 11 of the Uniform Limited Act. That statute was directed only to those businesses

permitted to be conducted under its own provisions. There was no "erroneous belief." The legislature did not intend that section to be used as a device to deprive customers of a banking or brokerage house of the protection otherwise given them.

Finally the respondents could not avail themselves of that section for the documents finally executed were but a "flimsy contrivance" to conceal the relation of part of the respondents to the special partnership. It was conceived in concealment and misrepresentation and they could not have "erroneously believed" that they were limited partners.

Part of the respondents, probably having little faith in the application of that section did not even make the renunciation required by that section and none of the respondents showed full compliance therewith.

We submit that the declared Illinois statutory policy that after July 1, 1917, a banking or brokerage concern could only be conducted as a general partnership should be given full effect.

The order of the Circuit Court of Appeals should be reversed and that of the District Court confirmed.

Chicago, October, 1923.

William Burry,
Julius Moses,
Guy M. Peters,
Lewis F. Jacobson,
Attorneys for Petitioners.